

BY THE COURT:

DATE SIGNED: November 30, 2020

Electronically signed by Jerilyn M. Dietz
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

ANTON DONEFF SR. et al

vs.

Case No. 20 CV 116

WISCONSIN DEPARTMENT OF REVENUE

DECISION

FACTS

The parties reached a joint statement of stipulated facts during prior proceedings, which is included in this file. That statement of facts is adopted and incorporated by reference into this decision. In short, this matter involves a series of deeds filed involving Anton Doneff, his sister Sarah Bonovic, their uncle Nicholas Doneff¹, and property herein referred to as Southbrook².

On January 12, 2016, two Electronic Real Estate Transfer Returns (eRETR) were filed with the Manitowoc County Register of Deeds. The first quit claim deed, document 1164161, conveyed the property from Southbrook LLP to Nicholas J. Doneff, Anton A. Doneff, and Sarah L. Bonovich.³ The eRETR claimed exemption from transfer fee under §77.25(15m), Wis. Stats. The second quit claim deed, document number 1164162, conveyed the property from Nicholas J. Doneff, Anton A. Doneff, and Sarah L. Bonovich to Southbrook Apartments LLC⁴. This eRETR claimed exemption from transfer fee under §77.25(15s), Wis. Stats. After receiving notice of additional assessment of real estate transfer fee on the second conveyance, issued on November 17, 2017 by the Department of Revenue, the plaintiffs

¹ Joint Stipulation of Evidentiary Facts, ¶4

² Joint Stipulation of Evidentiary Facts, ¶4

³ Joint Stipulation of Evidentiary Facts, ¶1

⁴ Joint Stipulation of Evidentiary Facts, ¶2

requested redetermination of the second conveyance, stating that this conveyance was actually exempt under §77.25(6m), Wis. Stats.

The parties agree that Southbrook CCP and Southbrook Apartments, LLC were never merged or converted⁵. The plaintiffs cite administrative errors as the sole reason the merger did not occur, and filed a number of documents purporting to prove the intention of the three plaintiffs to merge the LLP and the LLC.

On February 23, 2018, the plaintiffs filed another eRETR, this a deed conveying the property from Southbrook LLP to Southbrook Apartments, LLC. This deed is document 1164161, and the plaintiffs argue that this is a corrective instrument, as permitted under § 706.085(1)(b)1., Wis. Stats., correcting the first conveyance to reflect the intentions of the parties. The plaintiffs also claim in this eRETR that the transfer is exempt from transfer fee under §77.25(6) or (6m), Wis. Stats. The plaintiffs claim, in briefs on file, that this transfer was accomplished via two separate deeds for reasons unknown, by an unknown staff person in their attorney's office.

PROCEDURAL HISTORY

The two tax assessments that resulted from this set of transactions were appealed to the Department of Revenue and then to the Tax Commission. The assessments were consolidated into one matter, and the Tax Commission issued a written decision in favor of the Department of Revenue on February 20, 2020. The plaintiffs now seek judicial review of that decision.

STANDARD OF REVIEW

The standard of review is established in §227.57, Wis. Stats. This section gives direction as to each portion of this review. It reads, in applicable part: "(1) The review shall be conducted by the court without a jury and shall be confined to the record...

(2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

(5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

⁵ Joint Stipulation of Evidentiary Facts, ¶10

(10) Subject to (11), upon such review due weight shall be accorded the experience, technical competency, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it.

(11) Upon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law."

APPLICABLE LAW

§77.25, Wis. Stats (2014-2015)⁶, which was in effect as of the date of the two original conveyances, reads, in relevant part: "The fees imposed by this subchapter do not apply to a conveyance..."

(6) Pursuant to mergers of corporations.

(6m) Pursuant to the conversion of a business entity to another form of business entity under s. 178.1141, 179.76, 180,1161, 181.1161, or 183.1207, if, after the conversion, the ownership interests in the new entity are identical with the ownership interests in the original entity immediately preceding the conversion.

(15m) Between a corporation and its shareholders if all of the stock is owned by persons who are related to each other as spouses, as lineal ascendants, lineal descendants or siblings, whether by blood or by adoption, or as spouses of siblings, if the transfer is for no consideration except the assumption of debt or stock of the corporation and if the corporation owned the property for at least three years.

(15s) Between a limited liability company and one or more of its members if all of the members are related to each other as spouses, as lineal ascendants, lineal descendants or siblings, whether by blood or adoption, or as spouses of siblings and if the transfer is for no consideration other than the assumption of debt or an interest in the limited liability company...."

§706.085: (1) Entitled to be recorded; purposes. An instrument correcting a previously recorded conveyance shall be entitled to record in accordance with s. 706.05 in the office of the register of deeds of the county in which the conveyance is recorded and shall include one or more of the following:

⁶ 2015 Wisconsin Act 295, published March 31, 2016, amended § 77.25, Wis. Stats. This court is bound by the law, as written by the legislature, in effect at relevant the moment in time. If the legislature wished to apply its changes retroactively, it was free to do so. It did not choose to do so with this Act, and therefore neither can this court.

(b) The addition, correction, or clarification of information other than a legal description, including any of the following information: 1. A party's name, including the spelling of the name; a first or middle name or initial; a name suffix, such as senior or junior; alternate names by which the party is known; or a description of an entity as a corporation, company, or similar identifier.

8. The nature and purpose of the conveyance.

STATEMENT OF ISSUES

- 1) Was the February 23, 2018 deed a corrective instrument as permitted by §706.085?
- 2) Was the transfer from Southfield LLP to the three individual plaintiffs exempt from transfer fee under any section of §77.25, and, was the transfer from the three individual plaintiffs to Southbrook Apartments LLC exempt from transfer fee under any section of §77.25?

DISCUSSION AND DECISION

1) *Corrective Instrument*

Whether the belated deed at issue here qualifies as a corrective instrument requires the interpretation of law, and as such no deference is given to the decision of the tax authority. The plaintiff argues that a corrective instrument is prima facie evidence in and of itself that the facts contained therein are true. This argument is repeated, underlined, and italicized, but the defendant does not argue that the information in that instrument is false. Rather, the issue is whether the transfer sought to be effectuated by that third deed is, in fact, a correction under permitted by §706.085(1)(b)1. or 8. The statute gives a non-exhaustive list of permitted corrections. The examples given, however, are all errors or omissions. The correction sought by the plaintiff is a complete undoing of two simultaneously filed deeds, fundamentally changing the nature of the first conveyance.

Changing the exemption claimed is a permissible correction, under §706.085(1)(b)8., Wis. Stats. Changing the grantee from three individuals to a corporation is a far more fundamental alteration to the facts of the situation, which cannot be simply “corrected.” The examples given are not exhaustive, but are certainly illustrative. To ignore the examples and give the statute as broad an application as is sought by the plaintiffs would be to eliminate the meaning of the bulk of the statute. Had the legislature intended to allow amendments of any kind for any reason, it could easily have said as much. It did not. There are limits to how far the use of a correction instrument can be stretched. Changing the grantee from individuals to a corporation is outside the bounds of the statute as written.

This rigid reading of the statute is bolstered by the Court of Appeals’ holding in *Turner v. Department of Revenue*, 2004 WI App 82, ¶10, 271 Wis.2d 760, 679 N.W.2d 880 (Ct. App.

2004). In *Turner*, as here, the effort at a correction instrument was “...an attempt to nullify, not correct, the original transfer.” *Id.* This case closely analogous to the situation here. The plaintiffs’ attempt to distinguish their transfer fails as it relies on the existence of two deeds having been filed, where *Turner* involved one.⁷ This is a distinction without a difference, particularly in light of the plaintiffs’ assertion that the only reason there were two deeds recorded was an error by an unknown staffer in their attorney’s office. The efforts to avoid transfer fees by use of a correction instrument to nullify the first transfer is exactly what occurred in *Turner*. Therefore, the same reasoning applies. A correction deed cannot be used to change a party. In conclusion, this was not a permissible modification for a corrective instrument, and the initial transfer remains unchanged.

2) Exemptions from Transfer Fees

The analysis here is as to the application of facts to the plain language of the statute and discretionary decisions made by the Department of Revenue, rather than an interpretation of the law. Therefore, §§227.57(2) and (10) direct that this court look deferentially at the action taken by the Department.

When filed, the plaintiffs claimed that the first transfer was exempt from transfer fees under §77.25(15m), Wis. Stats.⁸ The nature of the family relationship between the three grantees is not one enumerated in that section. Later filings claimed this transfer was exempt under (6m)⁹, which require that entities or corporations merge or be converted. The parties’ joint stipulations of fact agree that the two corporations at issue have not merged nor been converted, for reasons not fully explained¹⁰. The plaintiff asks that the transfer be exempted on equitable grounds, but a plain reading of the statute provides no basis for this exception. Deference to the action taken by the Department further bars the creation of this exemption. The Department denied the request for reconsideration. There is no ground under §227.57(2) by which this could be set aside. Accordingly, the Department action is affirmed.

The same is true as to the second transfer. There is no exemption under the law as it existed at the time of the transfer, and no basis on which this court may overrule the Department. The claimed exemption, §77.25(15s), requires the familial relationship that does not exist in this case. Accordingly, the Department’s action as to both transfers is affirmed.

⁷ Petition for Judicial Review, ¶13

⁸ Attachment to Petition for Review, Circuit Court File document no. 44, p.7 of 60.

⁹ Attachment to Petition for Review, document no. 44, p. 17 of 60

¹⁰ Petition for Judicial Review, ¶11: “a timing issue.” Attachment to Petition for Review, p. 17 of 60: “due to an administrative error.”